86-1325 (1)

No. .....

In The
Supreme Court of the United States
October Term, 1986

ANTHONY J. CHESNEY and
CHARLOTTE CHESNEY,

Petitioners,

vs.

CAROL H. SPRAGGINS,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

Whether the right to retain counsel by a defendant in civil litigation, *at his own expense,* is a fundamental right, protected by the Constitution, though not specifically enumerated in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REFERENCE TO THE UNOFFICIAL OPINIONS

The unreported opinions of all courts below have been attached in the appendix of this Petition.

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STATEMENT OF JURISDICTION

On August 27, 1986, the Superior Court of New Jersey, Appellate Division, affirmed the granting of Full Faith and Credit to a Virginia judgment in favor of Carol H. Spraggins, Plaintiff/Respondent, entered on December 9, 1983.

On November 13, 1986, the Supreme Court of the State of New Jersey denied the Appellant's Appeal and Petition for Certification.

Petitioners rely on the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States as a basis for this Petition for Writ of Certiorari.

———o———

CONSTITUTIONAL PROVISIONS UNDER CONSIDERATION

Fifth Amendment to the Constitution of the United States:

> No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service at the time of War or public danger; nor shall

> any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—o—

STATEMENT OF FACTS

1. On February 16, 1983, the Respondent, Carol H. Spraggins, a resident of the State of Virginia, filed suit against the Petitioners, Anthony J. Chesney and Charlotte Chesney, residents of the State of New Jersey, in the Circuit Court of the City of Virginia Beach, Virginia.

2. On August 17, 1983, attorney Boyd Scarborough, counsel for the Petitioners, filed an Answer and Motion to Quash Service of Process and to Dismiss for Lack of Jurisdiction on behalf of the Petitioners.

3. On October 12, 1983, Mr. Scarborough sent a certified letter to the Petitioners, which was signed for by Mrs. Chesney's elderly father. The father did not turn this letter over to the Petitioners.

4. On October 21, 1983, the Honorable J. Gilbert Van Sciver, in a case titled *J. Russell Fentress III v. Anthony J. Chesney,* Superior Court of New Jersey, Law Division, Burlington County, Docket No: L-8886-83, entered a Restraining Order which, by its construction, prohibited Anthony J. Chesney (and thereby, his wife, Charlotte Chesney) from "selling, transferring, consuming, removing, disposing of, or otherwise conveying any property, whether it be real, personal, or a mix thereof, presently owned or under control of the defendant Anthony J. Chesney, except for that property which shall be used for ordinary life's necessities."

5. On November 9, 1983, an Order was entered in the Circuit Court of the City of Virginia Beach, Virginia, allowing Boyd Scarborough to withdraw as attorney for the Petitioners.

6. On November 23, 1983, fourteen days after the Order was entered, Mr. Scarborough sent a copy of the Order to the Petitioners by certified mail.

7. The Petitioners received Mr. Scarborough's mail on November 28, 1983, which informed the Petitioners that, for undisclosed reasons, Mr. Scarborough had withdrawn

as their counsel and advising the Petitioners that they should find new counsel before the trial scheduled for December 8, 1983.

8. On December 6, 1983, the Petitioners, through their New Jersey counsel, contacted the Respondent's attorney in Virginia to request a continuance in the hearing so that the Petitioners could have the necessary time to retain new counsel in Virginia. This request was categorically denied.

9. On December 6, 1983, the Petitioners' New Jersey counsel contacted the attorney of J. Russell Fentress III with the request that the Petitioners be allowed to have the Restraining Order modified so that funds would be available to them to retain new counsel in Virginia. This request, too, was denied.

10. On December 6, 1983, the Petitioners filed a pro se Motion for Continuance and a Motion to Extend the Time to Answer with supporting affidavits. The Motions were sent by United States Post Office Express Mail, and were received by the Circuit Court of the City of Virginia Beach, Virginia, at 7:30 a.m. on December 8, 1983.

11. On December 8, 1983, at 2:30 p.m., the Honorable Kenneth Whitehurst heard the case without the Petitioners or a representing attorney being present.

12. In a letter dated December 8, 1983, the same day as the trial, Judge Whitehurst informed the Petitioners that their Motions had been denied because they had not arrived until after the trial.

13. On December 16, 1983, the Petitioners filed a pro se Motion to Reopen the Case on the ground that they

had been unable to retain new counsel in Virginia prior to the trial date.

14. On December 29, 1983, the Motion was heard by Judge Lam, sitting in the absence of Judge Whitehurst. The Petitioners' New Jersey counsel, Alan B. Baybick, Esquire, attended this hearing with the Petitioners and requested the Court's permission to appear for the Petitioners. The Respondent's Virginia counsel objected to Mr. Baybick's appearance since he was not a member of the Virginia Bar, and the court sustained the objection.

15. The Petitioners filed an Appeal with the Virginia Supreme Court of January 28, 1984. On September 21, 1984, the Petitioners were advised by the Respondent's attorney that the appeal had been dismissed.

16. The Respondent filed a Complaint against the Petitioners in the Superior Court of New Jersey, Burlington County, Law Division, seeking Full Faith and Credit of the Virginia judgment. The Respondent then moved for Summary Judgment.

17. The Petitioners filed a Motion in Opposition to the Summary Judgment on the ground that the Virginia judgment had been obtained in violation of the Petitioners' due process of law, and was therefore not entitled to Full Faith and Credit in the State of New Jersey. However, Summary Judgment was granted in favor of the Respondent.

18. The Petitioners filed an Appeal with the Appellate Division of the Superior Court of New Jersey, which affirmed the decision of the Law Division without address-

ing the issue of the violation of the Petitioners' due process of law.

19. The Petitioners filed an Appeal and a Petition for Certification with the Supreme Court of the State of New Jersey, which was denied without addressing the issue of the violation of due process or the Petitioners' fundamental right to an attorney, at their own expense.

REASONS FOR THE ALLOWANCE OF THE WRIT

Petitioners, Anthony J. Chesney and Charlotte Chesney, submit that this case is worthy of consideration by this Court because the issues raised in this case require the interpretation and construction of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of the State of New Jersey, by denying the Petitioners' Appeal and Petition for Certification, failed to address an important question of federal law which has not been, and should be, settled by this Court. The questions raised in this Petition for Writ of Certiorari are of vital importance to all citizens of this country.

The issue which Petitioners submit for this Court's consideration is whether the right to retain counsel by a defendant in civil litigation, *at his own expense*, is a fundamental right, protected by the Constitution, though not specifically enumerated in it.

The Sixth Amendment requires that in all criminal prosecutions, the accused has the right to have the assistance of counsel to prepare his defense. Historically, the courts have held that the right to counsel was one of the many enumerated, fundamental rights protected by the Constitution which effectively insured that the accused's Fifth Amendment right—that no person be deprived of life or liberty without due process of law—was not violated. The Fourteenth Amendment assures that no State deprive any person of life or liberty without due process of law. Both the Fifth and the Fourteenth Amendments guarantee that no person be deprived of his property without due process of law as well.

Petitioners submit that a defendant in civil litigation has the equivalent right to retain counsel, *at his own expense,* to protect his property. As an accused in a criminal prosecution must have the assistance of counsel in preparing his defense so that he is protected from wrongful penalty or incarceration, it follows that a defendant in civil litigation, accused of a civil wrong, must have the aid of counsel in preparing his defense so that he may benefit from the attorney's expertise and knowledge and effectively protect his property.

Petitioners acknowledge that the Sixth Amendment has traditionally been applied only in criminal prosecutions, whereas, the Fifth and Fourteenth Amendments have also been applied to civil cases. However, Petitioners contend that there exists certain fundamental rights which are protected by the Constitution, though they are not specifically enumerated within its construction. The right to retain counsel by a defendant in civil litigation, *at one's*

own expense, is such a fundamental right not specifically enumerated in the construction of the Constitution, yet still protected by it. As the accused in a criminal case needs the aid of an attorney to defend his life and liberty, so does a defendant in a civil litigation need the aid of an attorney to defend his property.

The Petitioners believe that this is a case of first impression. While many cases have discussed the right of a criminal defendant to retain counsel, and how the deprivation of that right would violate the accused's right to due process of law, no cases have addressed the right of a defendant in civil litigation to retain counsel, *at his own expense,* and how a denial of that right would violate the defendant's right of due process. However, the Petitioners rely on the opinion of Justice Sutherland in *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), a criminal case wherein Justice Sutherland spoke extensively on the importance of the assistance of counsel at trial. Justice Sutherland stated:

> "What, then, does a hearing include? Historically, and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and *provided by the party asserting the right.* The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . Left without the aid of counsel, he may be put on trial without proper charge, convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and the knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceed-

> ings against him . . . *If in any case, civil or criminal, a state or federal court were to arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.*" Id at 69 (emphasis added)

In the case sub judice, the Petitioners' Virginia counsel was permitted by the Virginia court to withdraw on the eve of trial, and the Petitioners were not made aware of that fact until less than ten days prior to the trial date. Their request for a continuance was categorically denied: first, by the Respondent's attorney in Virginia, and then by the Circuit Court of the City of Virginia Beach, Virginia, in spite of the fact that both the Respondent's attorney and Judge Whitehurst were informed and aware that the Petitioners were without counsel in the State of Virginia. Furthermore, their pro se Motion to Reopen the Case, grounded on the fact that they were without counsel and needed time to retain a new attorney, was also denied by the Circuit Court.

The refusal by the Respondent's attorney, an officer of the Court, and the refusals by the Circuit Court, to allow the Petitioners time to retain new counsel completely denied the Petitioners of any fundamental fairness. The Petitioners sought only a fair hearing in which both sides would benefit from the expertise and knowledge of counsel. The matter was simply too complex to have expected the Petitioners to plead their case pro se.

Justice Sutherland, in *Powell,* supra, elaborated further on the need of the assistance of counsel and its importance in the due process concept. He stated:

"The fact that the right [to retain counsel] involved is of such character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions' is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution. [I]t is possible that some of the personal rights safeguarded by the first eight amendments against Nation action may also be safeguarded against state action, because denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law. *While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.*" Id at 68 (emphasis added)

The Petitioners submit that the Virginia courts violated their right to due process of law, protected by the Constitution, by its allowing their Virginia counsel to withdraw on the eve of trial and then by its refusals to permit them the necessary time to retain new counsel to defend their cause. The very purpose of an attorney in the court system is so that a lay person, unfamiliar with the law process and the multitude of defenses and procedures available to him, would have every opportunity to defend himself, his life, his liberty, and his property, in an action before the courts. The denial of a defendant the opportunity to retain counsel, *at his own expense,* to prepare a defense in a civil case is clearly not in conformity with the

general law, and violates the due process of law as proscribed in the Fifth and Fourteenth Amendments to the Constitution.

In *United States v. Dinitz*, 538 F.2d 1214 (C.A. 5th Cir. 1976), a criminal case, Circuit Judge Tjoflat held:

> "We certainly agree that the Sixth Amendment right to counsel is an absolute, unqualified right to the representation of counsel. And we also agree that the Sixth Amendment requires the courts to respect a defendant's own particular choice of counsel. *The right to counsel conceded, a defendant should be afforded a fair opportunity to secure counsel of his choice.*" Id at 1219 (emphasis added)

While Petitioners acknowledge that Judge Tjoflat was speaking only of defendants in criminal prosecutions, Petitioners believe that the same legal theory is applicable to civil defendants. Petitioners submit that they were denied fair opportunity to secure an attorney who could familiarize himself with the facts of their case and present an effective and proper defense for the Petitioners, and further, that this denial violated the Petitioners' fundamental right of due process of law. Petitioners further submit that the New Jersey courts erred in granting Full Faith and Credit to the Virginia judgment since the judgment was obtained in violation of the Petitioners' right of due process.

The Petitioners were also denied the right to retain counsel, *at their own expense*, by the Superior Court of New Jersey when Judge Van Sciver, in another civil action in which the Petitioners were involved, issued a Restraining Order which effectively denied the Petitioners the right to consume any of their assets for the purpose of

retaining new counsel in Virginia. The Restraining Order, by its own construction, in fact, denied the Petitioners the right to consume any of their assets in order to obtain the aid of counsel in *any* future legal action which might be instituted against them. Petitioners submit that Judge Van Sciver's Order denied them the fundamental right of due process and must be considered in determining whether, under the totality of facts, the Virginia judgment should have been granted Full Faith and Credit in New Jersey.

In support of their position, the Petitioners rely on *Worbetz v. Goodman,* 47 N.J.Super. 391 (App. Div. 1957), wherein Judge Hughes reviewed earlier United States Supreme Court cases dealing with the deprivation of counsel and the test applicable in determining if a defendant's due process had been violated. Judge Hughes stated:

> "An asserted denial of due process is to be tested by an appraisal of the *totality of facts in a given case.* That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations, fall short of such denial. *Powell v. Alabama,* supra; *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942); *Foster v. People of State of Illinois,* 332 U.S. 134, 67 S.Ct. 1716, 91 L.Ed. 1955 (1947); *Bute v. People of State of Illinois,* 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986 (1948); *Uveges v. Commonwealth of Pennsylvania,* 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127 (1948); *Gibbs v. Burke,* 337 U.S. 773, 69 S.Ct. 1247, 93 L.Ed. 1686 (1949). Deprivation of counsel in the constitutional sense is equally applicable to the entry of a plea equivalent to that of guilt as it is to the incidents of conventional trial *Uveges v. Commonwealth of Pennsylvania,* supra; *Palmer v. Ashe, Warden, etc.,* 342 U.S. 134, 72 S.Ct.

> 191, 96 L.Ed. 154 (1951) and such deprivation is of like significance whether it is accomplished by threat, inadvertence, pressure of judicial business, mistake, haste, or trick.'' Id at 399, 400 (emphasis added)

The Petitioners submit that the totality of facts in their case, once appraised, shows a decided lack of fundamental fairness for the Petitioners in every step of the proceedings and that their fundamental right of due process was violated repeatedly: their Virginia attorney was permitted to withdraw on the eve of trial; the Respondent's attorney, an officer of the Court, fully aware of the fact that the Petitioners were without counsel, refused to allow a continuance in the trial; the Circuit Court, in spite of the fact that it had timely received the Petitioners' Motions, likewise denied them a continuance; the Circuit Court further denied the Petitioners' Motion to Reopen the Case, grounded on the fact that the Petitioners were without counsel and needed time to retain new counsel in Virginia; and the New Jersey court imposed a Restraining Order on the Petitioners which deprived them of consuming any of their assets in order to obtain new counsel in the Virginia case. The Respondent has maintained throughout the proceedings that the Petitioners could have appeared pro se to defend themselves and their property. However, the nature of the case was a complex one, and to require the Petitioners to proceed without counsel would have placed an unfair burden on them. Petitioners submit that their fundamental right to an attorney, *at their own expense,* was denied and that, therefore, their right of due process of law was violated. The Petitioners believe that they are entitled to a full and fair hearing in which both sides are represented by counsel.

CONCLUSION

In order to insure a uniform standard of due process of law in civil litigations, as mandated by the Constitution of the United States, the Petitioners respectfully request that this Court decide the issue presented for the Court's consideration. Should this Court concede that the Petitioners' fundamental right to retain counsel, *at their own expense,* was denied and thereby, the Petitioners' right of due process was violated, then the Petitioners respectfully request that this Court remand their case back to the Supreme Court of New Jersey for further judicial review.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

APPENDIX

SUPREME COURT OF NEW JERSEY
C-305 September Term 1986

26,194

CAROL H. SPRAGGINS,

Plaintiff-Respondent,

vs.

ANTHONY J. CHESNEY, et al.,

Defendants-Petitioners.

ON PETITION FOR CERTIFICATION

(Filed November 13, 1986)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1233-84T7 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice at Trenton, this 10th day of November, 1986.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen W. Townsend

Clerk of the Supreme Court
of New Jersey

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1233-84T7

CAROL H. SPRAGGINS,

Plaintiff-Respondent,

v.

ANTHONY J. CHESNEY and CHARLOTTE CHESNEY,

Defendants-Appellants.

(Filed August 27, 1986)

Argued November 7, 1985—Decided August 27, 1986
Before Judges Fritz and Baime.

On appeal from Superior Court of New Jersey, Law Division, Burlington County.

Alan B. Baybick argued the cause for appellants.
Jeffrey V. Puff argued the cause for respondent.

PER CURIAM

Defendants appeal from an order entered in New Jersey enforcing a judgment entered in the Circuit Court of the City of Virginia Beach, Virginia, a court of record of general jurisdiction. We affirm.

The case is made to appear factually complex. For the purposes of testing the application in New Jersey of Article IV, § 1 of the *United States Constitution*, the full faith and credit clause, it is unnecessary for us to relate these complexities, reported at length in the brief of defendants, augmented by the substantial appendices. We

review the matter in terms of the grounds asserted by defendants on this appeal.

Nobody denies the entry of the judgment in Virginia or what that judgment was. Defendants say, however, that it was entered without their having been afforded due process, because (a) their counsel in the Virginia action abandoned his representation of them, (b) without effective notice to them, (c) at a critical time in the lifeline of the Virginia litigation and (d) when they were under constraints in connection with a New Jersey action that prevented them from doing anything further about it in Virginia. Whatever support appears for a theory that issues such as these should be tried in the rendering forum, *see Puzio v. Puzio*, 57 *N.J.Super.* 557 (App.Div. 1959),[1] the assertion of extrinsic fraud here require a searching examination of the equities of the situation, *Zelek v. Brosseau*, 47 *N.J.Super.* 521 (App.Div. 1957), aff'd for the reasons stated by Judge Goldmann in the Appellate Division, 26 *N.J.* 501 (1958). Although absolutely assured by the Constitution, due process itself is

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[1]While the record in this matter is abysmally uninformative, it would appear that defendants did, in fact, try the same due process issue in Virginia by way of a motion to reopen the case. The order denying this motion recites the appearance of defendants *pro se* and that evidence was heard *ore tenus*. It is probable that that determination warrants full faith and credit. *Lumbermans Mutual Casualty Co. v. Carriere*, 170 *N.J. Super.* 437, 452 (Law Div. 1979). *See* Annotation, "Foreign Judgment—Fraud as Defense," 55 *A.L.R.*2d 673, 676 (1957), where it is said, "Where the court rendering the judgment has expressly litigated the matter of fraud, that determination becomes res judicata on that point and is itself protected by the full faith and credit clause of the Federal Constitution." (Footnotes omitted.)

not an absolute proposition. The words are simply a metonym for fair play, *State v. Laganella,* 144 *N.J.Super.* 268, 284 (App.Div. 1976), app. dism. 74 *N.J.* 256 (1976), and its measurement is a balancing, related to circumstances and other rights and remedies, perhaps of other persons, to give the words depth and meaning. Viewed from this perspective, the record here persuades us that defendants have not justified their claim of a lack of due process. We think is as likely that the problems besetting them resulted not from extrinsic fraud but at best from defendants' own willful neglect and at worst from a design of studied avoidance and evasion of the processes of court, both in Virginia and New Jersey. Accepting on faith, despite its apparent improbability, their assertion that although concededly the certified letter dated October 12, 1983 from the resigning attorney was received by Charlotte Chesney's father, a member of their household, but never turned over to them, we have difficulty accepting the rationality of the asserted basis for their not attending the trial of December 8, 1983, by which time they had had notice of the defection. The forwarding of motion papers seeking a continuance by a method which produced their filing after the cause was heard hardly bespeaks the diligence which should have been practiced by those who now assert due process wrongs.

Defendants also fault the service upon them in the Virginia action, claiming they were never personally served pursuant to the Virginia "long-arm" statute. Even if true, the fact is of no consequence. In Virginia, process actually timely received is sufficient even though neither served nor accepted. "Except for process commencing actions for divorce or annulment of marriage, process

which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter." *Va. Code Ann.*, § 8.01-288. There can be no question that process reached defendants for they filed an answer and a demurrer to the action. Charlotte Chesney filed a motion to quash service of process for want of jurisdiction, itself an implicit admission that process had been served. It is notable that at no time in defense of the Virginia action did defendants raise in their pleadings the claim of defective service of process. The argument lacks merit.

Defendant Charlotte Chesney maintains that she "was not subject to the Virginia long arm statute." Again we suffer from the sparseness of the Virginia record. However, it is quite apparent that Charlotte Chesney protested the jurisdiction of Virginia courts over her person consistently from the very beginning. This being so it is inconceivable that the issue was not determined by the court which entered judgment in Virginia. It could not have been avoided on the motion to reopen. Put another way, defendant Charlotte Chesney did not persuade the trial judge that this issue was not determined in Virginia, nor has she persuaded us. That being so, the inescapably implicit determination in Virginia of personal jurisdiction is entitled to full faith and credit as well. *Hupp v. Accessory Distributors, Inc.*, 193 *N.J.Super.* 701, 709 (1984).

Finally, defendants raise for the first time in their reply brief an equal protection argument, conceding that it was not raised originally. We need not consider it. *See State v. Smith*, 55 *N.J.* 476, 488 (1970), *cert.* den. 400 *U.S.*

949 (1970). If we were to consider it we would observe that to the extent that it is not merely a reappearance of the due process argument in different clothing, it is a collateral attack on an entirely different determination in an entirely different action in New Jersey.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Elizabeth McLaughlin
Clerk

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ATTORNEY FOR PLAINTIFF

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BURLINGTON COUNTY

Docket No: L-004812-84
Civil Action

CAROL H. SPRAGGINS,

Plaintiff,

v.

ANTHONY J. CHESNEY and
CHARLOTTE CHESNEY,

Defendant.

ORDER ENFORCING THE VIRGINIA JUDGMENT

(Filed October 11, 1984)

THIS MATTER having been presented to the Court by Alan B. Baybik, Esq., attorney for the Defendants, ANTHONY J. CHESNEY and CHARLOTTE CHESNEY, and Jeffrey V. Puff, Esq., appearing on behalf of the Plaintiff, CAROL H. SPRAGGINS, and the Court having considered the Motion, Cross-Motion and Affidavits filed on behalf of the Defendants and Plaintiff and having heard argument of their respective counsel and being satisfied that the Plaintiff, CAROL H. SPRAGGINS is entitled to an Order Enforcing the Judgment of the Virginia Court on Friday, September 21, 1984;

IT IS on this 10th day of October, 1984 ORDERED and ADJUDGED as follows:

1. Judgment in the amount of ONE-HUNDRED TWENTY-FOUR THOUSAND NINE-HUNDRED THIRTEEN DOLLARS AND ELEVEN CENTS ($124,913.11), plus interest at Twelve (12%) Percent from the date of the Virginia Judgment, to wit: December 9, 1983 until September 21, 1984. [Two-Hundred Eighty-Seven (287) Days] at a per diem amount of FORTY-ONE DOLLARS ($41.00) per day; making a total interest due on the Virginia Judgment from December 9, 1983 until September 21, 1984 ELEVEN THOUSAND SEVEN-HUNDRED SIXTY-SEVEN DOLLARS ($11,767.00) for a total sum due and owing of ONE-HUNDRED THIRTY-SIX THOUSAND SIX-HUNDRED EIGHTY DOLLARS ($136,680.00) against the Defendants, ANTHONY J. CHESNEY and CHARLOTTE CHESNEY, jointly and severally. Interest shall accrue on the total Judgment at the legal annual rate of interest of Twelve (12%) Percent.

2. IT IS FURTHER ORDERED that Judgment in the amount of TWENTY-SIX THOUSAND FIVE-HUNDRED TWENTY-FIVE DOLLARS ($26,525.00) plus interest at Twelve (12%) Percent from the date of the Virginia Judgment dated December 9, 1983 until September 21, 1984 [Two-Hundred Eighty-Seven (287) Days at Eight Dollars and Seventy-Two Cents ($8.72) per diem] or TWO-THOUSAND FIVE-HUNDRED TWO DOLLARS AND SIXTY-FOUR CENTS ($2,502.64) for a total sum due and owing of TWENTY-NINE THOUSAND TWENTY-SEVEN DOLLARS AND SIXTY-FOUR CENTS ($29,027.64),

against the Defendant, ANTHONY J. CHESNEY as an Individual.

Interest shall accrue on the total Judgment at the legal annual rate of interest of Twelve (12%) Percent.

/s/ Hon. J. Gilbert Van Sciver, JSCa

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

AT LAW NO: 14,588
ENDED NO: 34040

CAROL H. SPRAGGINS,

Plaintiff,

vs.

ANTHONY J. CHESNEY and CHARLOTTE CHESNEY,

Defendants.

ORDER

CAME THIS day, the 29th of December, 1983, the defendants *pro se* and the plaintiff, by counsel, and upon defendants' Motion to Reopen the Case, evidence being heard *ore tenus,* and was argued by counsel. For good cause shown, it appearing proper to do so, it is

ADJUDGED, ORDERED and DECREED that the defendants' Motion be and hereby is *OVERRULED.*

ENTER THIS 13th day of January, 1984.

Henry L. Lam, Judge

I ASK FOR THIS:
/s/ James Amery Thurman p.q.

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed to Anthony J. Chesney and Charlotte Chesney, *pro se* defendants, 49 Blanchard Road, Marlton, New Jersey, and to Alan B. Baybick, Esquire, New Jersey counsel for

the defendants, 220 Wedgewood Drive, Cinnaminson, New Jersey, 08077, this 11th day of January, 1984.

/s/ James Amery Thurman

A Copy Teste: J. Curtis Fruit, Clerk

By /s/ Gladys J. Conboy D.C.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINA BEACH

LAW DOCKET NO: LA-14,588

CAROL H. SPRAGGINS,

Plaintiff,

vs.

ANTHONY J. CHESNEY and CHARLOTTE CHESNEY,

Defendant.

JUDGMENT ORDER

THIS CAUSE came to be heard on the 8th day of December, 1983, upon the Plaintiff's Motion for Judgment and the Defendant's Answer thereto, the Plaintiff, CAROL H. SPRAGGINS appearing in person and by counsel, and the Defendants, ANTHONY J. CHESNEY and CHARLOTTE CHESNEY, failing to appear in person or by counsel, despite personal service and proper notice, and neither party having demanded a jury, the whole matter of law and fact was heard and determined by the Court.

UPON CONSIDERATION WHEREOF, the Court, having examined the pleadings and having maturely considered all of the evidence heard *ore tenus* and through documents entered as Plaintiff's Exhibits, and upon argument of counsel, determined that the Defendants, ANTHONY J. CHESNEY and CHARLOTTE CHESNEY, are indebted to the Plaintiff, CAROL H. SPRAGGINS, jointly and severally, in the amount of Forty-Nine Thousand Nine Hundred Thirteen and 11/100 Dollars ($49,913.-11), and are liable for punitive damages in the amount of

Seventy-Five Thousand Dollars ($75,000.00), and that the Defendant, ANTHONY J. CHESNEY, individually, is additionally indebted to the Plaintiff, CAROL H. SPRAGGINS, in the amount of Twenty-Six Thousand Five Hundred Twenty-Five Dollars ($26,525.00), it is therefore

ADJUDGED, ORDERED and DECREED that the Plaintiff, CAROL H. SPRAGGINS, recover and have judgment against the Defendants, ANTHONY J. CHESNEY and CHARLOTTE CHESNEY, jointly and severally, in the sum of ONE HUNDRED TWENTY-FOUR THOUSAND NINE HUNDRED THIRTEEN AND 11/100 DOLLARS ($124,913.11), with interest thereon at the legal rate from December 8, 1983, until paid, together with her costs about her suit herein expended, and it is

Further ADJUDGED, ORDERED and DECREED that the Plaintiff, CAROL H. SPRAGGINS recover and have judgment against the Defendant, ANTHONY J. CHESNEY, individually in the sum of TWENTY-SIX THOUSAND FIVE HUNDRED TWENTY-FIVE AND NO/100 DOLLARS ($26,525.00), with interest thereon at the legal rate from December 8, 1983, until paid, and it is

Further ADJUDGED, ORDERED and DECREED that this judgment be docketed on the judgment lien book, and let execution issue forthwith.

ENTER on this 9th day of December, 1983.

/s/ Kenneth N. Whitehurst, Jr. Judge

I ASK FOR THIS:

/s/ James Amery Thurman p.q.

COMMONWEALTH OF VIRGINIA

(Seal)

SECOND JUDICIAL CIRCUIT

December 8, 1983

Philip L. Russo
Austin E. Owen
Henry L. Lam
George W. Vakos
Kenneth N. Whitehurst, Jr.
Bernard G. Barrow
Resident Judges
Circuit Court
City of Virginia Beach
Princess Anne
Virginia Beach, Virginia 23456-9002

N. Wescott Jacob
Resident Judge
Circuit Courts
Accomack County
Northampton County
Onancock, Virginia 23417

Anthony J. Chesney
Charlotte Chesney
49 Blanchard
Marlton, New Jersey

Re: Spraggins v. Chesney
at Law No. 14,588

Dear Mr. and Mrs. Chesney:

Your motions requesting a continuance and to extend the time to file answers to request for admissions were received by the court after your case was heard on December 8, 1983. Having already made a decision in your case, the

motions are hereby denied. A copy of the final judgment order will be forwarded to you upon request.

Very truly yours,

/s/ Kenneth N. Whitehurst, Jr.

KNW/ed

cc: James A. Thurman, Esquire

No. 86-1325

In The

Supreme Court of the United States

October Term, 1986

ANTHONY J. CHESNEY and
CHARLOTTE CHESNEY,

Petitioners,

vs.

CAROL H. SPRAGGINS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

JEFFREY V. PUFF, ESQ.
Attorney for Respondent
CAROL H. SPRAGGINS
122 Delaware Street
Woodbury, NJ 08096
(609) 845-0011

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Respondent, Carol H. Spraggins, sued Anthony J. Chesney and Charlotte Chesney, Petitioners, in the Circuit Court of the City of Virginia Beach, on February 16, 1983. Respondent filed a motion for entry of the default judgment on April 4, 1983. Respondent withdrew the motion in return for Petitioners' agreement to meet and negotiate. Following the meeting, Respondent's counsel endorsed an Order granting Petitioners' leave to file pleadings. On August 17, 1983, Petitioners entered a general appearance by counsel with the filing of a joint Answer to Respondent's Motion for Judgment, a joint Demurrer and a Motion to Quash Service of Process, and a Motion to Dismiss for Lack of Jurisdiction as to the Petitioner, Charlotte Chesney, only.

On October 3, 1983, the case was set for trial in Virginia on December 8, 1983. Petitioners were immediately notified of the trial date by Virginia counsel, and on October 12, 1983, Virginia counsel mailed notice by certified mail to the Chesneys that he was withdrawing as counsel.

In November of 1983, the Petitioners' attorney, Boyd Scarborough, requested to withdraw from representing the Chesneys. The Chesneys had not paid any of his attorneys fees and refused to answer his phone calls or letters concerning the case. The Chesneys were totally uncooperative and made it impossible for Mr. Scarborough to represent them. The Virginia Court granted his request to withdraw in an Order dated November 9, 1983.

On December 8, 1983, Virginia counsel for Respondent, attorney James Thurman obtained a Judgment after

full trial on the merits, Petitioners not appearing in person nor by counsel despite proper notice. (See Petitioners' Appendix, p. A12). The Chesneys attempted to file a motion to continue the case. This motion, however, was not received by the Virginia Court in a timely fashion. Judge Whitehurst, who had already rendered a Judgment in the case, later dismissed the motion for being untimely.

The Petitioners motioned to re-open the case and an evidentiary hearing was held as to all issues on December 29, 1983, before the Honorable Henry L. Lam. (It should be noted that Judge Lam was not the trial judge). This hearing was attended by the Chesneys. Evidence was heard as to all issues, including the Petitioners' claim for denial of counsel. In an Order dated January 13, 1984, the Petitioners' motion to re-open was denied and the Judgment below given full force. (See Petitioners' Appendix, p. A10).

On January 27, 1984, the Petitioners attempted to file a Notice of Appeal to the Virginia Supreme Court. This Notice of Appeal was dismissed by the Court.

The Respondent filed suit on January 23, 1984 in the New Jersey Superior Court, Law Division, to enforce the Virginia Judgment in New Jersey.

On October 10, 1984, after a hearing in which both parties were represented by counsel, the Honorable Gilbert Van Sciver, J.S.C., entered an Order granting Summary Judgment for the Respondent, pursuant to the Full Faith and Credit Clause of the United States Constitution. (See Petitioners' Appendix, p. A7).

The Petitioners appealed to the New Jersey Superior Court, Appellate Division. In a per curiam opinion dated August 27, 1986, the Appellate Division affirmed the Law Division's Judgment against the Petitioners. Contrary to the Petitioners' version of the facts, the New Jersey Appellate Division did, in fact, address the Petitioners' due process claims. (See Petitioners' Appendix, p. A2).

The Petitioners filed an appeal and a Petition for Certification with New Jersey Supreme Court; same being denied without a written opinion. (See Petitioners' Appendix, p. A1).

SUMMARY OF REASONS FOR DENIAL OF THE WRIT

Respondent respectfully submits that no special or important reasons exist for the granting of the Petition for the Writ of Certiorari. The Petitioners' issue of the right to counsel in civil matters has been fully and clearly decided in that it is textbook law that no right to counsel in civil matters is guaranteed by the United States Constitution.

Further, under the facts of the Petitioners' case, the Petitioners were in no way denied the right to counsel by either the State of Virginia or New Jersey.

Lastly, the Petitioners are appealing from the wrong judgment. The Petitioners have appealed the New Jersey Judgment which granted full faith and credit to a Judgment obtained by the Respondent in the State of Virginia.

The issue of whether the Petitioners were denied counsel in Virginia is not reviewable by a state court enforcing a sister state's judgment pursuant to full faith and credit. The Respondent maintains that the only proper appeal by the Petitioners would have been from the Virginia Judgment, where the Petitioners allege the denial of counsel took place.

REASONS FOR DENIAL OF THE WRIT

Supreme Court Rule 17(1) states in part that "a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special or important reasons therefor". No such special or important reasons exist in this case which should compel the Court to grant the Petitioners' Writ of Certiorari. It is textbook law that the United States Constitution does not guarantee an individual the right to counsel in civil actions. No right to counsel in civil matters existed at common law, and no such right was preserved by the Constitution. The issue is and has been for hundreds of years, fully and clearly decided and need not be addressed by this Court.

In their petition, the Petitioners cite numerous cases which they claim support their position that a right to counsel in civil matters exist. Every one of these cases, however, are criminal cases. The Petitioners cannot cite even one state or federal case which is precedent for or supports their position. This is because no court has ever held that such a right to counsel is contained in the Constitution, either enumerated or otherwise.

Further, without conceding her position, Respondent would submit to the Court that factually, the Petitioners were not denied the opportunity to retain counsel in either Virginia or New Jersey. As the New Jersey Appellate Division so adeptly pointed out in their opinion, "(W)e think it as likely that the problems besetting them (the Chesneys) resulted not from extrinsic fraud but at best from defendants' own willful neglect and at worst from a design of studied avoidance and evasion of the processes of court, both in Virginia and New Jersey", (see Petitioners' Appendix, p. A4).

The Petitioners have argued that their Virginia counsel abandoned them on the eve of trial. This is simply incorrect. Mr. Scarborough gave all of the proper notices to the Chesneys and applied to the Court in late October, early November 1983, to be relieved as counsel because the Chesneys refused to answer his phone calls or letters. Furthermore, the Chesneys had not paid him anything from the time he was retained, sometime between April and August 1983, until the time he withdrew, a period of some 4 to 8 months. The Chesneys made it completely impossible for Mr. Scarborough to represent them. By order dated November 9, 1983, Mr. Scarborough was relieved as counsel for the Petitioners. According to the Petitioners' own version of the facts (with which the Respondent takes issue), the latest the Petitioners would have known that they did not have counsel in Virginia would have been November 28, 1983, a date which was not the *eve* of trial, but rather 10 days before trial.

The Petitioners have also argued that a New Jersey restraining order prevented them from obtaining counsel.

For numerous reasons this argument is invalid. To begin, the restraining order on its face did not prevent the Chesneys from obtaining Virginia counsel, nor did any fair reading of the Order do so. The restraining order was designed to prevent the Chesneys from disposing of their assets so as to prevent them from avoiding judgments against them. It allowed them reasonable living expenses and ostensibly, the right to use funds to pay their attorney reasonable fees.

It should also be noted that on no occasion did the Chesneys ever inquire with the Honorable J. Gilbert Van Sciver, (the judge who issued the restraining order), to determine whether they were restrained from using funds to obtain Virginia counsel. In fact, the initial restraining order contained a provision for the Chesney's New Jersey counsel, Alan Baybick, to be paid a $1,000.00 fee. This restraining order did not prevent the Chesneys from paying Virginia counsel to represent them. Take note as well, that the restraining order was not in effect until months after Mr. Scarborough was retained, yet the Chesneys failed to pay him any fee during the course of his representation.

The Petitioners' issue is essentially moot because even if such a right to counsel existed, the Petitioners were in no way prevented from obtaining counsel, either in Virginia or New Jersey. The sole reason the Petitioners were left without representation in the Virginia courts was due to their own willful neglect and avoidance.

Lastly, the Respondent would point out to the court that the Petitioners are seeking a review of the New Jersey Judgment (the New Jersey Judgment enforced the Virginia Judgment pusuant to the Full Faith and Credit

Clause of the United States Constitution, Article IV, Section 1), and not the Judgment obtained in Virginia where the alleged denial of representation occurred. The Petitioners did not appeal the Virginia Judgment beyond the Virginia Supreme Court. They now seek to raise the right to counsel issue on collateral attack on Writ of Certiorari from the enforcing state, New Jersey. The Respondent maintains, again without prejudicing her previous position, that should this Court decide that a right to counsel in civil matters exists, and should the Court also find that the Petitioners were denied that right, their appeal would still fail because the issue of right to counsel would not be reviewable by a state court (i.e., New Jersey) enforcing a sister state's judgment pursuant to full faith and credit. Petitioners should have appealed the Virginia Judgment, where the alleged denial of counsel took place, and not the New Jersey Judgment which enforced it.

In sum, the Respondent submits that the issue raised by the Petitioners, the right to counsel in civil matters, has been and is fully and clearly decided, and that no special or important reasons exist for the granting of the Petition for the Writ of Certiorari.

———o———

CONCLUSION

Respondent respectfully prays that this Honorable Court deny the Petitioners' Petition for the Writ of Certiorari. Respondent contends that this appeal is frivolous and hereby prays that this Honorable Court, pursuant to United States Supreme Court Rules 49 and 50, impose on the Petitioners' costs, damages, and such further relief deemed just and equitable by the Court.

Respectfully submitted,

JEFFREY V. PUFF, ESQ.
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Woodbury, NJ 08096
(609) 845-0011